83-1226

Office - Supreme Court, U.S.
FILED
JAN 21 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 198__

JOHN GARRETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

Clinard J. Hanby
2701 Fannin
Houston, TX 77002
(713) 659-8989

Attorneys for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED FOR REVIEW

1. Can federal jurisdiction under the Travel Act be sustained when the interstate nexus essential to such jurisdiction consisted of a single interstate telephone call to an undercover agent which was unessential to the underlying state offense?

2. Were the activities of the federal agents in this case (which consisted of instigating and participating in a scheme to bribe a local official with admitted disregard to any consequences to the local government involved) sufficiently outrageous to give rise to the defense suggested by the majority of this court in *Hampton v. United States*?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF FACTS	3
REASONS WHY WRIT SHOULD BE GRANTED	6
A. FEDERAL JURISDICTION UNDER THE TRAVEL ACT	6
B. OUTRAGEOUS GOVERNMENT CONDUCT	21
CONCLUSION AND PRAYER	29
CERTIFICATE OF SERVICE	30
APPENDICES:	
A. Opinion of the Court of Appeals	1a
B. Opinion of the District Court	39a
C. Judgment of the Court of Appeals	42a
D. Order of the Court of Appeals Overruling Motions for Rehearing	43a

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES	Page
18 U.S.C. § 1952 ("The Travel Act")	*passim*
28 U.S.C. § 1254	1
28 U.S.C. § 1359	17
United States Constitution, Amend. V	3

CASES	Page
Erlenbaugh v. United States, 409 U.S. 239, 34 L.Ed.2d 446, 93 S.Ct. 477 (1972)	7
Hampton v. United States, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976)	22, 24, 27

CASES

Page

Perrin v. United States, 444 U.S. 37, 62 L.Ed.2d 199, 100 S.Ct. 311 (1979) 7, 8
Rewis v. United States, 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971) 7, 8, 10, 11, 20
United States v. Alexandro, 675 F.2d 34 (2d. Cir.), *cert. denied*, __U.S.__, 74 L.Ed.2d 75, 103 S.Ct. 78 (1982) .. 24
United States v. Altobella, 442 F.2d 310 (7th Cir. 1971).. 8, 10
United States v. Archer, 486 F.2d 670 (2d. Cir. 1973) 9, 10, 14, 18, 19, 20, 21
United States v. Bass, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971) 7
United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) ... 24, 26
United States v. Burkley, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966, 59 L.Ed.2d 782, 99 S.Ct. 1516 (1979) 25
United States v. Clayton, No. H-30-74 (S.D. Tex. 1980) .. 4
United States v. Corcione, 592 F.2d 111 (2d. Cir.), *cert. denied*, 440 U.S. 975, 59 L.Ed.2d 794, 99 S.Ct. 1545 and 440 U.S. 985, 60 L.Ed.2d 248, 99 S.Ct. 1801 (1979) ... 24, 25
United States v. Craig, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820, 58 L.Ed.2d 110, 99 S.Ct. 82-3 (1978) 12
United States v. Eisner, 533 F.2d 987 (6th Cir.), *cert. denied*, 429 U.S. 919, 50 L.Ed.2d 286, 97 S.Ct. 314 (1976) 11, 12
United States v. Garcia, 562 F.2d 411 (7th Cir. 1977) 24
United States v. Giordano, 693 F.2d 245 (2d. Cir. 1982) .. 25
United States v. Graves, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923, 55 L.Ed.2d 516, 98 S.Ct. 1485 (1978) 24
United States v. Hauser, No. CR-78-1313 (D. Ariz. 1979) 3
United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 41 L.Ed.2d 1146, 94 S.Ct. 3183 (1974) 9, 10, 11
United States v. Jannotti, 673 F.2d 578 (3d. Cir.), *cert. denied*, 457 U.S. 1106, 73 L.Ed.2d 1315, 102 S.Ct. 2906 (1982) 24
United States v. Johnson, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075, 55 L.Ed.2d 780, 98 S.Ct. 1264 (1978) 24
United States v. Kaminski, 703 F.2d 1004 (7th Cir. 1983) 24
United States v. Khatib, 706 F.2d 213 (7th Cir. 1983) ... 25
United States v. LeFaivre, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004, 43 L.Ed.2d 762, 95 S.Ct. 1446 (1975) 10, 12

CASES

Page

United States v. Leja, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074, 55 L.Ed.2d 780, 98 S.Ct. 1263 and 436 U.S. 948, 56 L.Ed.2d 790, 98 S.Ct. 2853 (1978) ... 28
United States v. Lightfoot, 506 F.2d 238 (D.C. Cir. 1974) 9, 10
United States v. McCormick, 442 F.2d 316 (7th Cir. 1971) 9, 10
United States v. McQuin, 612 F.2d 1193 (9th Cir. 1980), *cert. denied*, 445 U.S. 954, 63 L.Ed.2d 791, 100 S.Ct. 1607 and 445 U.S. 955, 63 L.Ed.2d 791, 100 S.Ct. 1608 (1980) ... 25
United States v. Marcello, 537 F.Supp. 1364 (E.D. La. 1982) ... 4
United States v. Monaco, 700 F.2d 577 (10th Cir. 1983) .. 26
United States v. Myers, 692 F.2d 823 (2d. Cir. 1982), *cert. denied*, ____U.S.____, 77 L.Ed.2d 1322, 103 S.Ct. 2437-8 (1983) ... 24
United States v. Nardello, 393 U.S. 286, 21 L.Ed.2d 487, 89 S.Ct. 534 (1969) ... 7, 20
United States v. Norton, 700 F.2d 1072 (6th Cir.), *cert. denied*, ____U.S.____, 76 L.Ed.2d 814, 103 S.Ct. 1885 (1983) ... 24, 25
United States v. O'Dell, 671 F.2d 191 (6th Cir. 1982) 10, 11
United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), *aff'd*, 444 U.S. 37, 62 L.Ed.2d 199, 100 S.Ct. 311 (1979) 18
United States v. Prarie, 572 F.2d 1316 (9th Cir. 1978) ... 25
United States v. Quinn, 543 F.2d 640 (8th Cir. 1976) 25
United States v. Russell, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973) ... 22
United States v. Szycher, 585 F.2d 443 (10th Cir. 1978) .. 25
United States v. Thomas, 567 F.2d 638 (5th Cir.), *cert. denied*, 439 U.S. 822, 58 L.Ed.2d 114, 99 S.Ct. 90 (1978) 24
United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108, 73 L.Ed.2d 1317, 102 S.Ct. 2908 (1982) ... 24, 27, 28
United States v. Twigg, 588 F.2d 373 (3d. Cir. 1978) 24, 26, 28
United States v. Wander, 601 F.2d 1251 (3d. Cir. 1979) .. 13

OTHER AUTHORITY

Sen. Doc. No. 98-5160, p. 56, 97th Cong. 2d. Sess. (1982) 29

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 198__

JOHN GARRETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court Of The United States:

NOW COMES JOHN GARRETT, petitioner, and files this Petition for Writ or Certiorari and would show as follows:

OPINIONS BELOW

1. The opinion of the Court of Appeals for the Fifth Circuit is published at 716 F.2d 257.

2. The opinion of the District Court for the Southern District of Texas on the issues presented in this petition is unpublished and is reproduced in the appendix.

STATEMENT OF JURISDICTION

1. The judgment of the Court of Appeals is dated September 19, 1983.

2. A timely Motion for Rehearing was overruled on November 22, 1983.

3. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. The Travel Act, 18 U.S.C. § 1952, provides as follows:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 USCS § 802(b)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.
>
> (c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

2. The Fifth Amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF FACTS

The present case results from an FBI sting operation which has become commonly known as "Brilab." The sting operation was the result of a plea bargain between the government and one Joseph Hauser. Mr. Hauser pleaded guilty in federal court in Arizona to criminal charges arising from a scheme to swindle health, welfare, and pension funds from labor unions. (R. VII, 23-24; See *United States v. Hauser*, No. CR-78-1313 (D. Ariz., 1979)). In exchange for a light sentence, substantial compensation and fringe benefits, and the benefits of the Federal Witness Protection Program, Mr. Hauser agreed to participate as a government agent in an undercover operation. (R. VII, 23-24, 143-44; IX, 204-204).

To facilitate the operation, Hauser and two FBI agents, Mike Wacks and Larry Montague, established a bogus insurance agency known as Fidelity Financial Consultants in Beverly Hills, California, in mid-April, 1979. (R. XI, 6). A cover was arranged whereby Fidelity would purport to represent Prudential Insurance Co. (R. XIV, 22-24). In reality, of course, there was no such organization as Fidelity, and Fidelity had no connection with Prudential or any other insurance company. (R. XVIII, 206).

The original plan was that Mr. Hauser would contact officials of labor unions and offer them large bribes and a percentage of the commission if they would cause their labor unions to purchase insurance from Prudential through Fidelity. (R. VI, 203-204). Hence, the name of

the operation became "BriLab," an abbreviation of "Bribery-Labor." Hauser's efforts in Southern California were unsuccessful (R. VII, 209; X, 125-126), and Hauser expanded the operation to Texas. (R. VII, 210-212, 220). After contacting a series of intermediaries, Hauser concocted a plan to bribe Defendant L. G. MOORE, a labor union official, in order to obtain insurance business from MOORE's labor unions. (R. VIII, 38-41).

At approximately this point, for reasons which are unclear in the record, the objects of the conspiracy underwent an enormous expansion. Instead of attempting to bribe labor union officials for the purpose of obtaining insurance business from labor unions, Hauser began planning to bribe almost anyone he could find for the purpose of obtaining insurance business from almost any organization whatsoever. (See e.g. GX 10, 6-13). Thus, Hauser's efforts expanded to include an effort to bribe certain Texas legislators (See *United States v. Clayton*, No. H-80-74 (S.D. Tex. 1980)), an effort to bribe certain individuals in Louisiana, (See *United States v. Marcello*, 537 F. Supp. 1364 (E.D. La. 1982)), and the present effort to bribe the Houston City Council.

It was undisputed that Mr. Hauser, a government agent, instigated the plan to bribe the Houston City Council. Defendant MOORE introduced Hauser, F.B.I. Agent Wacks, and F.B.I. Agent Montague to GARRETT, the Houston Port Commissioner, at his office in Houston. (GX 11, 42-43). The group solicited GARRETT's aid in obtaining insurance business for Prudential. (GX 11, 51). No limitation was placed on where this insurance business should be obtained, and a discussion followed concerning the Port Commission Contract and the Harris County Contract. (See GX 11, 51-66). Eventually, Hauser directed the inquiry toward how the insurance contract for

the City of Houston could be obtained. (GX 11, 66). GARRETT then made a phone call to his friend, Jim Westmoreland, a Houston City Councilman, and inquired about the city contract. (GX 11, 75).

Approximately two months later, a meeting was held at the Grand Hotel Bar in Houston between MOORE, Agent Wacks, Agent Montague, GARRETT, Marinello (an attorney from Louisiana reputed to have underworld connections), and Westmoreland (GX 25). A very vague conversation ensued, but the jury apparently believed that an agreement was reached that Westmoreland would be paid some unstated sum of money in return for his efforts to steer the insurance contract to Prudential. (GX 25, 57, 58, 81). Montague had previously informed the Defendants that the commission would be split fifty-fifty between the agents and the Defendants. (GX 23, 16). The commission would have amounted to over a million dollars. (See GX 37, 2).

Two weeks later, on December 26, the Houston City Council voted to award the city insurance contract to Prudential pursuant to a package set up by the Texas Municipal League. (R. XIV, 14). The actual contract to be signed was an intra-state contract between the city of Houston and the Texas Municipal League. (R. XXI, 47). The Texas Municipal League contracted with a Texas insurance company which, in turn, contracted with Prudential. (*Id.*). The Texas Municipal League program was the low bid and the best program, and the award of the contract probably had absolutely nothing to do with the efforts to pay Westmoreland. (R. XX, 52; XXI, 42-44). This, however, was unknown to the F.B.I. agents. (R. XXI, 145; XVII, 123, 160). But for a sheer coincidence, the city of Houston would have purchased inferior insurance via the efforts of the federal government. (*Id.*).

Defendants' convictions were based on an interstate call placed by MOORE to Wacks on December 27, the day after the council voted. (GX 37). MOORE informed Wacks that an additional ten thousand dollars was needed to commit a couple more councilmen. (GX 37, 1). According to MOORE, the contract could be resolved within twenty minutes if each councilman were promised five thousand dollars (in reality, the contract had been signed the day before). (GX 37, 3). At one point, MOORE further claimed that GARRETT was present during the call. (GX 37, 6, 8). Approximately ten days later, MOORE and GARRETT accepted six thousand dollars as their share of the first month's commission. (GX 51, 37). Westmoreland was apparently paid five thousand dollars pursuant to the prior agreement. (GX 59; GX 64). Shortly thereafter, GARRETT and MOORE were arrested.

Defendants were indicted for one count of conspiracy to use interstate facilities to facilitate bribery in violation of 18 U.S.C. § 1952 and for two substantive violations of said act. Trial was to a jury which found defendants guilty on one of the substantive counts but was unable to reach a decision on the remaining counts. The United States Court of Appeals for the Fifth Circuit affirmed, and a timely Motion for Rehearing was overruled.

REASONS WHY WRIT SHOULD BE GRANTED

A. Federal Jurisdiction Under the Travel Act

This case presents an opportunity for this Court to: (1) curb the rapidly growing tendency of federal law enforcement to inject itself into areas of traditionally local concern and (2) alleviate the resulting burden on the already overcrowded federal courts. In the present

case the F.B.I. instigated a bribery scheme involving a local official and local participants. Jurisdiction was based on a single interstate phone call placed to one of the F.B.I. undercover agents. The phone call was unnecessary to the scheme and played no integral part in it. This Court should rule that the federal Travel Act does not reach so far as to include this phone call.

This Court has rendered decisions regarding the scope of the Travel Act on four separate occasions. *United States v. Nardello*, 393 U.S. 286, 21 L.Ed.2d 487, 89 S.Ct. 534 (1969); *Rewis v. United States*, 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971); *Erlenbaugh v. United States*, 409 U.S. 239, 34 L.Ed.2d 446, 93 S.Ct. 477 (1972); *Perrin v. United States*, 444 U.S. 37, 62 L.Ed.2d 199, 100 S.Ct. 311 (1979). The most significant case for present purposes is *Rewis*. There, this Court held that the Travel Act could not be used to ensnare the proprietors of an illegal gambling operation simply because the operation was frequented by out-of-state bettors. This Court began by noting that the Travel Act was "aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811. This Court expressed concern that a broad interpretation of the Travel Act would "alter sensitive federal-state relationships" and "could overextend limited federal police resources." 401 U.S. at 812; *see also United States v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). This Court's conclusion was as follows: "In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of § 1952." 401 U.S. at 812. More recently, in *Perrin* this Court did not purport to rule on the sufficiency of the interstate nexus. *See* 444 U.S. at 50. However, the language of the

opinion has been interpreted by the government in its argument to the court below as severely limiting, if not overruling, *Rewis*. In *Perrin*, this Court explained *Rewis* as follows:

> Our concern there was with the tenuous interstate commerce element. Looking at congressional intent in that light, we held that Congress did not intend that the Travel Act should apply to criminal activity within one State solely because that activity was sometimes patronized by persons from another state . . .
>
> [S]o long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement.

444 U.S. at 50.

Subsequent to *Rewis*, the courts of appeals have rendered a number of decisions regarding the scope of federal jurisdiction under the Travel Act. These decisions cannot be reconciled. The Seventh Circuit has taken the lead in urging a narrow construction of the Travel Act. In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971) the court found no jurisdiction under the Travel Act where defendants had merely cashed an out-of-state check which was the fruit of an extortion scheme. The court interpreted the Travel Act as being of limited scope:

> That congress did not intend to exercise its full constitutional powers in the area of local law enforcement is demonstrated by the wording of the Act and specifically by the use of the word "thereafter."

Id. at 314. The court held that jurisdiction under the Act requires a "significant use of a facility of interstate commerce. . . ." *Id.* Thus,

> [W]hen both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed.

Id. at 315.

In *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 41 L.Ed.2d 1146, 94 S.Ct. 3183 (1974) the Seventh Circuit reiterated its narrow view of the scope of the Travel Act. There, the court rejected federal jurisdiction where certain checks used to distribute the proceeds of an illegal bribery scheme had cleared through an out-of-state federal reserve bank. The court reasoned as follows:

> Similarly, were the § 1952 counts here to be upheld the federal-state balance would be seriously upset. It would be the rare case where investigation of an enterprise in violation of state law would not disclose some incidental and fortuitous use of interstate facilities which might then be used to support a federal prosecution. Nothing in the legislative history supports such a broad reading of the statute.

Id. at 1147. *See also United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971).

Following the lead of the Seventh Circuit, at least three other circuits have either held or implied that jurisdiction under the Travel Act requires a significant utilization of interstate facilities. *United States v. Archer*, 486 F.2d 670, 682-3 (2d Cir. 1973) ("the call served no purpose that would not have been equally served by a call from New York; the most that can be said is that when the defendants made their despicable agreement with Bario, they were told he might be calling from across the Atlantic rather than the East River—a matter of complete indifference to them." *Id.* at 683); *United States v. Light-*

foot, 506 F.2d 238 (D.C. Cir. 1974); *United States v. O'Dell*, 671 F.2d 191 (6th Cir. 1982).

The Fourth Circuit, on the other hand, has taken the lead in urging a broad-ranging interpretation of the Travel Act. In *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004, 43 L.Ed.2d 762, 95 S.Ct. 1446 (1975) the court was faced with a set of facts very similar to those faced by the Seventh Circuit in *Altobella* and *Isaacs*. The defendants were the owners of a local gambling operation in Baltimore. The only connection shown between the gambling operation and interstate commerce was that fourteen out-of-state checks issued in settlements of bets had passed through interstate banking channels in the clearing process. Nevertheless, the court upheld jurisdiction under the Travel Act. The court expressly refused to follow the Seventh Circuit decisions:

> It is possible that those cases [*Altobella*, *Archer* and *McCormick*] may be confined to their facts. If not, we decline to follow them and reject any narrowly restrictive reading of the Act.

Id. at 1294. The Fourth Circuit's interpretation of the Act has the effect of narrowing this Court's *Rewis* opinion into practical non-existence. The *Rewis* opinion was apparently based on broad policy considerations—a concern that the prosecution of the proprietors of an essentially local gambling operation in federal court would "alter sensitive federal-state relationships" and "overextend limited federal police resources." Nevertheless, the *LeFaivre* case upholds federal jurisdiction over precisely such a prosecution. The effect is that federal jurisdiction depends upon whether the customers pay by check or in cash, a matter of little significance.

One other circuit has, at least temporarily, adopted the Fourth Circuit's broad interpretation of the Travel Act. In *United States v. Eisner*, 533 F.2d 987 (6th Cir.), *cert. denied*, 429 U.S. 919, 50 L.Ed.2d 286, 97 S.Ct. 314 (1976) defendant was the proprietor of an illegal prostitution business. The only use of an interstate facility shown was that one customer had paid for his entertainment with checks drawn on an out-of-state bank. Fifteen such checks were introduced into evidence. Faced with a challenge to the jurisdiction, the court noted the conflict between the Seventh Circuit and the Fourth Circuit. The court opted for the Fourth Circuit interpretation: "any use of an interstate facility in furtherance of one of the unlawful activities defined in the Act is enough to satisfy the jurisdictional requirements of the Travel Act." *Id.* at 991; *but see United States v. O'Dell, supra* where the Sixth Circuit has apparently retreated to a less broad-ranging interpretation of the Act.

The *Eisner* case also narrows *Rewis* practically out of existence. Thus, it is highly unlikely that this Court intended to make any distinction between an illegal gambling business and an illegal prostitution business. Under *Rewis* the prostitution business would not be a federal crime simply because it was patronized by out-of-state customers. Thus, under *Eisner* the *Rewis* holding is applicable only so long as the customers pay in cash. In this age of routine payment by check or credit card the *Eisner* case makes the *Rewis* holding very narrow indeed. The thrust of this Court's *Rewis* decision was a concern with the federalization of local crimes and the injection of already overextended federal law enforcement and courts into a traditionally local arena. As emphasized by the Seventh Circuit in *Isaacs*, it is a rare criminal activity

that does not involve at least one out-of-state check, credit card, or interstate phone call. Thus, under the *LeFaivre* and *Eisner* decisions virtually any local "unlawful activity" can, upon careful investigation at the discretion of the prosecutor, be federalized.

Certain circuit judges have expressed grave concerns about the expansion of federal law enforcement. In *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820, 58 L.Ed.2d 110, 99 S.Ct. 82-3 (1978) the normally conservative Seventh Circuit upheld Travel Act jurisdiction based on a single out-of-state trip which occurred during the course of a local scheme to bribe the Illinois legislature. Judge Swygert registered a strong dissent:

> This case follows a pernicious trend that has been developing in our federal criminal jurisprudence over a long period of time: the extension of federal jurisdiction beyond anything intended by Congress when it enacted the various provisions of the Criminal Code.

Id. at 497.

> There is no showing that the bribery scheme in any way depended on this one incident of interstate travel. That the members of the ID-MCRA were meeting in Indianapolis was completely fortuitous.

Id. at 504.

> I conclude by depicting a scenario which I have little doubt approximates the facts of this prosecution. Federal officials, getting wind of a deal between the Illinois state legislators and the ready-mix cement industry, assign agents to investigate. In due course, immunity is promised to some of the involved legislators and company officials in return for their cooperation and testimony. Recording devices are placed on some of the immunized per-

> sons to obtain inculpating admissions from those who are the targets of the prosecution. Once the investigation is completed, consideration is then given to what federal offense, if any, has been committed. The mail fraud statute? The federal Travel Act? The investigation files are searched to find some mailings or evidence of interstate travel. The United States attorney's office sifts through the mailings in the file and then constructs a legal theory in order that they may be used to form the basis for a charge of mail fraud. One fortuitous trip, totally incidental and unforeseen, by an unindicted co-chemer forms the basis of the two Travel Act counts. A conspiracy count is, of course, added. In this fashion, the mail fraud statute and the Travel Act are subverted to purposes for which they were never intended. No longer are the mailings and travel considered essential or an integral part of the scheme; they are seen and used as mere technicalities which are necessary to obtain federal jurisdiction.

Id. at 505. *See also United States v. Wander,* 601 F.2d 1251 (3d Cir. 1979) ("assume that all the activity took place in Philadelphia, Pennsylvania and that Ms. Currie left Philadelphia only long enough to have lunch across the river in Camden, New Jersey. Assume further that during lunch she received a phone call, and her return to Philadelphia from Camden was in response thereto. Would there be federal jurisdiction under the Travel Act?" *Id.* at 1265, Aldisert, circuit judge, dissenting.)

Clearly, if the approach advocated by the Seventh Circuit and by Judges Swygert and Aldisert is applied to the case at hand, there was no federal jurisdiction. This was an essentially local scheme to bribe a local city councilman. The payment was negotiated, the vote accomplished, and the state crime completed without the

use of an interstate facility. This conviction rests on a single interstate phone call placed to a federal undercover agent posing as a conspirator after the objects of the scheme were apparently accomplished. The phone call was hardly an integral part of the scheme and served no purpose which could not have been served by a local call. The presence of the agents in California at the time of the call can only be described as "happenstance." One suspects, as did Judge Swygert, that the phone call was found as an afterthought as an excuse for federal jurisdiction.

The present case is further complicated by the heavy involvement of the government agents in creating the jurisdictional nexus. The interstate telephone call upon which jurisdiction was based was ultimately the product of the activities of the agents. The agents chose to locate their bogus insurance agency in California. The agents instigated the plan to bribe the Houston City Council. The agents chose to return to California shortly before the council voted.

The leading case on artificial creation of federal jurisdiction in a criminal setting is *United States v. Archer, supra,* a case whose rationale was partially rejected by the court below. 716 F.2d at 267, n. 5. The facts in *Archer* bear a striking resemblance to the facts in the case at hand and will be discussed in detail. There, as here, the federal government created a crime in the hope of ensnaring a corrupt agent of a local government. There, the "crime" was conceived at a February, 1972 meeting attended by the regional director of the Bureau of Narcotics and Dangerous Drugs, several agents of the F.B.I., including one Bario, Vincent Murano, a New York City police officer, and two assistant United States

attorneys. Pursuant to the plan, Bario assumed a new identity and posed as a resident alien with connections to the Las Vegas underworld. He was supplied with fake identification and two loaded pistols. Murano staged an arrest of Bario on the phony charge of unauthorized possession of the pistols, a felony under New York law. Bario was booked, arraigned, and admitted to bail. His bond was posted by another government agent posing as his father. A preliminary hearing was waived, and the case was forwarded for presentation to the grand jury.

A government informer introduced Bario to Defendant Wasserberger, a Manhattan bail bondsman. Wasserberger introduced Bario to Defendant Klein, a Queens attorney. Bario declined a proposal that he plead to a misdemeanor charge. It was agreed that the only solution was to have the grand jury return no indictment. Klein informed Bario that this could be arranged for a lot of money—probably between $10,000.00 and $15,000.00 in cash. Klein sought a telephone number where he could reach Bario in Las Vegas, but Bario responded that he would be out of the country and would call Klein instead. Later, Wasserberger asked how he could reach Bario in Las Vegas. Bario responded that he could be contacted by paging at the Sahara Hotel or by leaving a message with the hotel operator.

Several days later, Bario, who had gone to France on an unrelated investigation, called Klein from Paris. Klein arranged a meeting at his office at which time he said he would have news. On the morning before the meeting, Bario and Murano went to a hotel in Newark, New Jersey, and called Klein's office. Klein was not in, so a message was left. Later that morning, Klein returned the call.

Bario, Wasserberger, and Klein met at Klein's office later in the day. Klein stated that he was in touch with an assistant district attorney, Defendant Archer. Archer had suggested that Klein create a fictitious story to justify Bario's possession of the guns. Such a story was concocted. Klein informed Bario that the total price would be $15,000.00 in cash.

Three days before the grand jury was scheduled to meet, Bario made an intrastate call to Wasserberger. Wasserberger said that he had been trying unsuccessfully to call Bario in Las Vegas in order to inform him that the grand jury meeting had been postponed.

Bario appeared before the grand jury and told his concocted tale. Archer persuaded the grand jury to return no indictment. Shortly thereafter, government agents observed an encounter between Klein and Archer. About a month later, Wasserberger, Klein, and Archer were arrested.

The Second Circuit began by noting that the only activities which could possibly constitute using "any facility in interstate or foreign commerce . . . to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of . . . extortion, bribery, or arson . . ." were the three telephone calls. The first such call was Bario's call from Paris to Klein; the second was Klein's call to Bario at the hotel in New Jersey; and the third was Wasserberger's call to Nevada in an effort to reach Bario. The Court immediately discarded the call from Klein to Bario in New Jersey:

> Whatever Congress may have meant by § 1952 (a)(3), it certainly did not intend to include a

> telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime. In view of the totally fabricated nature of this episode, it is immaterial that Klein returned the call rather than receiving it as the Government had plotted.

Id. at 681.

The Court was equally quick to reject the unsuccessful attempts to reach Bario in Las Vegas. "Those calls also resulted from a plant by the Government." *Id.* at 682. Or, as the Court had earlier stated:

> Congress . . . did not mean to include cases where the federal officers themselves supplied the interstate element and acted to insure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, Cf. 28 U.S.C. § 1359.

Id.

Finally, the Court of Appeals rejected Bario's call from Paris. It is true that this call was not contrived in the sense that the other calls were contrived—Bario had a legitimate reason for being in Paris. However:

> [T]he call served no pupose that would not have been equally served by a call from New York; the most that can be said is that when the Defendants made their despicable agreement with Bario, they were told he might be calling from across the Atlantic rather than the East River—a matter of complete indifference to them.

Id. at 683. In short, the Paris call was merely an incidental event, unessential to the bribery scheme. The Court of Appeals proceeded to reverse the convictions and order the indictments dismissed.

In rejecting the government's motion for rehearing, the Court held as follows:

> While the government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves . . .

Id. at 685-686. This passage has been cited as limiting the impact of *Archer*. *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978), *aff'd*, 444 U.S. 37, 62 L.Ed.2d 199, 100 S.Ct. 311 (1979). However, even this limited interpretation of *Archer* falls squarely within the case at hand. If a "stricter standard" is applied to what is already a very marginal jurisdictional basis, as in the case at hand, the scales are tipped against the exercise of federal jurisdiction.

The only thing which distinguishes the present case from *Archer* is the more elaborate nature of the government's ruse. The government's decision to locate its bogus insurance agency in California was purely arbitrary. There was no evidence produced at trial demonstrating that the California location was either necessary or useful to the government's operation. Had a Texas location been chosen, there would have been no Travel Act violation. This would have been true despite the fact that defendant's conduct was identical in all material respects with the conduct which, in fact, occurred. It seems almost preposterous that the existence or non-existence of a federal crime depended almost exclusively on the government's arbitrary selection of the locale for an insurance agency —a *fictitious* insurance agency. On rehearing, the Court in *Archer* spoke directly to this point:

> The Government places great weight on the fact that Bario was in Paris on legitimate business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consummated.

Id. at 685.

Furthermore, the decision of Agents Wacks and Montague to leave town after the agreement with Westmoreland was struck, but before the pay-off, was equally arbitrary. There was no showing that it was necessary or useful to either the government's "sting" operation or the bribery scheme that the agents be out-of-town on December 27. Indeed, it appears that Agents Wacks and Montague were in and out of Houston during this time period. It was at best a matter of happenstance, and perhaps, a matter of governmental design, that the agents had returned to Los Angeles at the time of the City Council vote and on the following day when Moore called. The *Archer* Court spoke to this point on rehearing also:

> Despite the copious citation of cases, including many not included in its original brief, not one of the Government's citations supports application of the Travel Act where the sole "federal" elements were telephone calls *from or to* an undercover agent.

Id. at 684 [Emphasis supplied].

It may be argued that, despite the passage last quoted, it somehow makes a difference that the Paris call in *Archer* was *from* the government agent rather than *to*

him. This, however, is a very dubious distinction. The defendants in *Archer* were ready and willing to use interstate facilities. They *twice* sought the agent's Las Vegas phone number. They tried to call the agent in Las Vegas. In the case at hand, however, the agents went one step further in their efforts to create jurisdiction and supplied a number where they could actually be reached. The record does not reflect whether defendants sought this number or whether the agents volunteered it. Jurisdiction should not depend on whether the agents give a real phone number or a bogus one. It should also be noted that, in *Archer*, the agent's Las Vegas address at least gave some credibility to his claim of "underworld" connections. Here, the agents' California address served no apparent purpose.

Under these circumstances, the concerns about altering sensitive Federal-State relationships expressed in *Rewis v. United States, supra,* are particularly compelling. As noted earlier, it is a rare criminal activity indeed that involves no out-of-state checks, credit cards, interstate phone calls, or other use of an interstate facility. Cases will be even rarer where a government agent, who has either instigated or infiltrated a scheme, will be unable to plan his activities so as to cause use of interstate facilities. Thus, we are approaching a situation where any of the "unlawful activities" enumerated in the Travel Act can be transformed into a federal crime virtually at the whim of federal law enforcement officers and prosecutors.

The legislative history of the Act has been reviewed by this Court both in *Nardello* and in *Rewis*. There, it was noted that the Act was aimed primarily at organized crime and, more specifically, at persons who reside in one state while managing unlawful activities in another state.

It was manifestly not the intent of Congress to transform all local extortion, bribery, or arson offenses into federal crimes. This Court should grant certiorari and reverse for lack of federal jurisdiction.

B. Outrageous Government Conduct

This case also provides an opportunity for this Court to clarify an issue of law left unsettled by previous opinions of this Court: When, if ever, does government over-involvement in criminal activity reach a level that prosecution is barred by due process? The facts pertinent to this issue are undisputed and shocking. Agents of the federal government thought up, instigated, carried on and participated in a scheme to bribe the Houston City Council. The agents neither knew nor apparently cared whether the insurance they were influencing the Council to accept was best for the City and its thousands of employees. It is impossible at this late date to be fully certain whether the City of Houston acquired its insurance through legitimate considerations or through the efforts of the federal government.

Over ten years ago in *United States v. Archer, supra,* Judge Friendly remarked that:

> [T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence against a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course the courts should be extremely reluctant to sanction.

Id. at 676-7. Bribery of a public official, like robbery, is classified in most states as a felony. Although the harm

to any particular individual caused by federally instigated bribery may not be as great as that caused by Judge Friendly's hypothetical robberies and beatings, the *number* of victims is enormous. This factor puts this case squarely within Judge Friendly's example.

This Court first discussed this issue in *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973). There, defendant was convicted of unlawfully manufacturing and selling methamphetamine. His sole defense was based upon governmental misconduct which occurred when an undercover agent supplied phenyl-II-propanone, a rare but essential ingredient in the manufacture of methamphetamine. The Court of Appeals for the Ninth Circuit found this to be an unacceptable level of governmental involvement in instigating crime and reversed the conviction.

This Court reversed the Ninth Circuit:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction [citation omitted], the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

411 U.S. at 431-2.

Three years later in *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976) defendant contended that the government had gone one step further and actually sold him the contraband to be resold to another undercover agent. The trial court refused

to instruct the jury that, if they believed this contention, they should acquit. On appeal, the Court of Appeals for the Eighth Circuit affirmed.

This Court also affirmed the conviction, but wrote three separate opinions. In the plurality opinion, Justice Rehnquist, joined by Chief Justice Burger and Justice White, expressed the opinion that, under no circumstances, could governmental over-involvement in crime reach such a level that prosecution would be barred by due process:

> The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies *solely* in the defense of entrapment.

425 U.S. at 490.

Justice Powell, joined by Justice Blackmun, concurred in the result. He disagreed with the proposition that due process could never bar the prosecution of a predisposed defendant, "regardless of the outrageousness of police behavior in light of the surrounding circumstances." 425 U.S. at 492. He particularly noted that: "Nor have we had occasion yet to confront Government over-involvement in areas outside the realm of contraband offenses." 425 U.S. at 493. He noted, however, that instances where this defense would be successful will be rare. "Police over-involvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." 425 U.S. at 495, n. 7. Justice Powell concurred in the result, however, because he believed that the alleged governmental conduct of supplying the contraband for resale to another government agent was not sufficiently outrageous to bar a conviction.

Justice Brennan, joined by Justice Stewart and Justice Marshall, dissented. He concluded that the police activity

there involved was "beyond permissible limits." 425 U.S. at 497. Thus, a majority of this Court, consisting of two concurring justices and three dissenting justices, recognized the existence of a due process defense based on police over-involvement in instigating crime.

Subsequent to *Hampton*, the majority of courts of appeals have expressed the opinion, usually in dicta, that "outrageous government misconduct" is still a viable defense in an appropriate case. *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075, 55 L.Ed.2d 780, 98 S.Ct. 1264 (1978); *United States v. Corcione*, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 975, 59 L.Ed.2d 794, 99 S.Ct. 1545 and 440 U.S. 985, 60 L.Ed.2d 248, 99 S.Ct. 1801 (1979); *United States v. Alexandro*, 675 F.2d 34 (2d Cir.), *cert. denied*, ____U.S.____, 74 L.Ed.2d 75, 103 S.Ct. 78 (1982); *United States v. Myers*, 692 F.2d 823, 837 (2d Cir. 1982), *cert. denied*, ____U.S.____, 77 L.Ed.2d 1322, 103 S.Ct. 2437 (1983); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106, 73 L.Ed.2d 1315, 102 S.Ct. 2906 (1982); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923, 55 L.Ed.2d 516, 98 S.Ct. 1485 (1978); *United States v. Thomas*, 567 F.2d 638 (5th Cir.), *cert. denied*, 439 U.S. 822, 58 L.Ed.2d 114, 99 S.Ct. 90 (1978); *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108, 73 L.Ed.2d 1317, 102 S.Ct. 2908 (1982); *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980); *United States v. Norton*, 700 F.2d 1072 (6th Cir. 1983), *cert. denied*, ____U.S. ____, 76 L.Ed.2d 814, 103 S.Ct. 1885 (1983); *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977); *United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983);

United States v. Quinn, 543 F.2d 640 (8th Cir. 1976); *United States v. Prarie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. McQuin*, 612 F.2d 1193 (9th Cir. 1980), *cert. denied*, 445 U.S. 954, 63 L.Ed.2d 791, 100 S.Ct. 1607 and 445 U.S. 955, 63 L.Ed.2d 791, 100 S.Ct. 1608 (1980); *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978); *United States v. Burkley*, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966, 59 L.Ed.2d 782, 99 S.Ct. 1516 (1979).

Thus, the defense has been recognized but rejected in a variety of situations where law enforcement agents instigated or participated in crime but took affirmative steps to prevent harm to innocent third parties. In *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982) undercover agents, in an effort to trap a professional arsonist, considered employing him to burn an actual building. However, they actually hired him to burn a non-existent store. Thus, there was little danger of any actual harm. The court held that this did not violate due process. In *United States v. Norton, supra*, undercover agents infiltrated a scheme to bomb a synagogue. The agents substituted a fake bomb for the real one and caused the defendants to be arrested before the plan materialized. Thus, injury was prevented by the affirmative acts of the agents. The government participation in the scheme was held not to violate due process. In *United States v. Corcione, supra*, undercover agents, who were heavily involved in a scheme to smuggle heroin into the United States, substituted soap powder for the heroin. Thus, their involvement in the scheme was held not to have violated due process. Finally, in *United States v. Khatib*, 706 F.2d 213 (7th Cir. 1983) government agents who had sold illegal weapons to defendant arrested defendant immedi-

ately after the sale to prevent harm to third parties. Once again, there was no violation of due process.

Where undercover agents have actually participated in a crime *without* taking steps to mitigate the harm and no due process violation was found, it has always been apparent that the agents did not instigate the crime, and it would have occurred without their participation. Thus, in *United States v. Brown, supra,* a government informer who was participating in the investigation of a widespread burglary and fencing ring actually participated in a series of burglaries. However, it was abundantly clear that the burglaries would have occurred without his assistance. The informer planned none of the burglaries. He merely followed directions to prevent his identity as an informer from being exposed. This was held not to violate due process. In *United States v. Monaco,* 700 F.2d 577 (10th Cir. 1983) government agents allowed their informer to continue to work as a prostitute during the course of the investigation. However, the individual in question had long been a prostitute and almost certainly would have continued to work as a prostitute with or without the approval of the agents. Again, there was no violation of due process.

When government agents have instigated a crime and it has been apparent that the defendant would have been incapable of committing the crime without the assistance of the agents, the resulting prosecutions have been the subject of controversy in the lower courts. Thus, in *Twigg v. United States, supra,* government agents instigated a plan to manufacture illegal drugs. The government informer purchased all of the supplies, set up the laboratory, and was in complete charge of the entire operation. The defendants lacked the expertise to manufacture drugs

themselves, and any production assistance they provided was "minor and at the specific direction of Kubica [the informer]." After defendants were convicted, the Court of Appeals for the Third Circuit, with one judge dissenting, reversed. *Hampton* was distinguished as follows:

> In this case, however, we are not only concerned with the supply by government agents of necessary ingredients for manufacture, but we also have before us a crime, unlike *Hampton*, conceived and contrived by government agents.

Id. at 378. Thus, the court had "no trouble in concluding that the governmental involvement in the criminal activities of this case has reached 'a demonstrable level of outrageousness.' " *Id.* at 380.

In *United States v. Tobias, supra,* defendant purchased supplies from an undercover drug supply company operated by the federal government. When defendant attempted to cancel his order because he had discovered that he lacked the expertise to manufacture cocaine, one of the undercover agents suggested that defendant manufacture PCP instead. The undercover agents not only sent defendant all the necessary ingredients but also gave him advice on at least thirteen different occasions during the manufacturing process. It was apparent that defendant could not have manufactured the drug without the assistance of the agents. The Court of Appeals for the Fifth Circuit affirmed but cautioned: "This case does set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit." *Id.* at 387.

The dissenting judge repeatedly emphasized the fact that defendant would have been incapable of manufac-

turing any illicit drug without the assistance and encouragement of the government agents. He concluded as follows:

> I do not, of course, propose that federal courts be accorded a "chancellor's foot" veto over law enforcement techniques that are disapproved. [Citing *Russell, supra.*] I do suggest, however, that the majority goes too far by holding, in effect, that no matter how egregious and shocking the degree of Government involvement in the commission of a crime, neither the due process clause nor the court's supervisory powers will ever be invoked to preclude prosecution.

Id. at 392-3, Johnson, Judge, dissenting. *See also United States v. Leja,* 563 F.2d 244 (6th Cir. 1977), *cert. denied,* 434 U.S. 1074, 55 L.Ed.2d 780, 98 S.Ct. 1263 and 436 U.S. 948, 56 L.Ed.2d 790, 98 S.Ct. 2853 (1978) where the Sixth Circuit, with one judge dissenting, affirmed a conviction on facts vaguely similar to those in *Twigg.* However, the defendants had instigated the crime and probably could have carried it out without the assistance of the agents.

This case represents a step beyond *Twigg* or *Tobias.* Clearly, the government agents instigated this crime. It is undisputed that both the general idea of bribing people to obtain insurance contracts and the specific idea of bribing the Houston City Council originated in the minds of the government agents. The government agents participated in the scheme from start to finish. If they had withdrawn at any point, continuation of the scheme would have been impossible—literally pointless. Furthemore, in both *Twigg* and *Tobias* the government ended its scheme before there was any possibility of harm to third persons. In this case the federal agents allowed the city council to vote (and, indeed, sign a contract) knowing that some

of the votes were the product of the efforts of the federal government and not the product of a legitimate desire to promote the welfare of the city. This is more than this Court should tolerate.

The remarks of the Committee on the Judiciary, United States Senate regarding a similar F.B.I. investigation are quite appropriate here:

> It is well that justice is blind for she would not care to see what has been wrought in her name. This investigation is a shame and a disgrace. The FBI created a conspiracy to investigate and investigated it as some elaborate game without rules or purpose. The FBI seemingly lost sight of its mandate to uncover crime, not create it. The FBI and the Department ran this investigation without apparent concern for the consequence to the individuals under investigation or this nation's foreign policy. The FBI's questionable activities in the much publicized ABSCAM investigation caused this Congress to establish a Select Committee to consider the conduct of undercover investigations. The FBI's conduct of this undercover investigation is therefore of special concern not only to the public but also to members of the Select Committee to whom we commend this report.

"The Undercover Investigation of Robert L. Vesco's Alleged Attempts to Reverse a State Department Ban Preventing the Export of Planes to Libya," Sen. Doc. No. 98-5160, p. 56, 97th Cong., 2d Sess. (1982). This case should be reversed and an acquittal ordered.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Garrett prays that this case be reversed and remanded with orders to dismiss the indictment, or, alternatively,

that this case be reversed and remanded with orders to acquit. Defendant Garrett is *not* seeking a new trial.

Respectfully submitted,

HAYNES & FULLENWEIDER
A Professional Legal Corporation

By: _____
RICHARD HAYNES

By: _____
ROBERT B. WALLIS

By: _____
CLINARD J. HANBY*

2701 Fannin
Houston, Texas 77002
(713) 659-8989

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were served on The United States Solicitor General, Department of Justice, Washington, D.C. 20530, Daniel K. Hedges, U.S. Attorney, 515 Rusk, 12th Floor, Houston, Texas 77002 and Mike Ramsey, attorney for L. G. Moore, 202 Travis, Houston, Texas 77002 by _____ on this _____ day of _____, 1984.

_____

* Application for admission to the bar of this Court pending.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2147

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

JOHN GARRETT and L. G. MOORE,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

(September 19, 1983)

Before Wisdom, Tate, and Garwood, Circuit Judges.

TATE, Circuit Judge:

The defendants John Garrett and L. G. Moore appeal their conviction by a jury under 18 U.S.C. §§ 2, 1952(a)(3) ("The Travel Act")[1] for aiding and abetting

---

1. The Travel Act 18 U.S.C. § 1952 (1970), provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

one another in using and causing to be used a facility in interstate commerce with the intent to carry on a bribery scheme. The jury found that Garrett and Moore offered and agreed to offer a bribe to a Houston, Texas, city councilman for his recommendation and vote in awarding a contract of group insurance for the city's public employees. In facilitation of this unlawful scheme, the jury found, they caused to be used a facility in interstate commerce when Moore placed a long distance telephone call from Houston, Texas to a federal undercover agent in Beverly Hills, California, on December 27, 1979.

On appeal, the defendants challenge the sufficiency of Travel Act jurisdiction premised on an out-of-state phone call made to a federal agent. They claim that jurisdiction was artificaly created because the requisite interstate element was supplied by the location of the federal agent, and that the call did not "facilitate" the underlying state offense. Garrett and Moore also contend that

---

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

* * *

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

The "unlawful activity" facilitated by the use of interstate commerce in this case was bribery of a state official, proscribed by Tex. Penal Code § 36.02(a)(1),(3) (1975). This statute provides:

(a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

* * *

(3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official.

they were entrapped by the federal agents into performing unlawful acts, and that the government's conduct was so outrageous as to constitute a violation of due process. Garrett argues that the evidence adduced at trial displayed his absolute lack of predisposition to commit bribery, such that he established entrapment as a matter of law. Moore contends that he was unable to make out the defense because the trial court refused to admit certain evidence of the government's inducements and testimony of witnesses that would tend to show lack of prediscription. Moore additionally argues that the trial court's determination to admit hearsay evidence of a taped conversation concerning his reputation as someone who would "deal" denied him federal constitutional confrontation and fair trial rights.

We find that on the evidence shown, the trial judge did not reversibly err in making these jurisdictional and evidentiary rulings. We therefore affirm the convictions.

Factual and Procedural Background

These Travel Act convictions are a result of a federal undercover operation that centered upon the suspected illegal activities of labor unions in promoting and contracting for insurance and pension benefits. In 1979, Joseph Hauser pleaded guilty to federal charges of paying bribes and receiving kickbacks in union insurance business; in return for a reduced sentence and financial support of himself and his family, he agreed to cooperate with the government in investigating this type of crime. Hauser and two F.B.I. agents, Mike Wacks and Larry Montague, established a fictitious insurance agency known as Fidelity Financial Consultants, with an office in Beverly Hills, California and a cover by which they would

purport to represent the Prudential Insurance Company, a large national concern. Their initial plan was for Hauser to expose corruption among labor leaders by bribing them to acquire union insurance through Fidelity.

The agents decided to expand operations outside California (at least in part because of publicity that Hauser was a government informer), and, because of Hauser's contacts, began to arrange insurance deals in Texas and Louisiana.[2]

The jury trial took place over 27 days of testimony. The defendants were charged on a conspiracy count and two Travel Act counts; after four days of deliberations, the jury convicted on one Travel Act count, but was unable to agree on a verdict on the conspiracy or other Travel Act Count. The government's case was presented during 19 days of testimony, most importantly the testimony of Hauser and the two F.B.I. agents, corroborated by tapes of conversations with the alleged conspirators and tapes of telephone conversations with them. The defendants' case was presented in eight days of testimony.

Aside from establishing that the insurance contract to Prudential at issue had been awarded on its merits in accord with the recommendation of the Texas Municipal League, and numerous character and reputation witnesses for both defendants, the defendants' case relied principally upon their own extensive testimony on the stand

2. The defendants were initially to be indicted with two of the participants in the Louisiana insurance scheme, but these charges were separately brought. The Louisiana dealings were not referred to at the trial, although there was testimony to the effect that Vincent Marinello, a primary actor in the Louisiana dealings, was present during a few of the meetings of the F.B.I. agents and Garrett and Moore.

by which they presented a lawful explanation for their actions. The substance of the explanation is that they were merely exploiting their political friendships in order to earn a share of a commission for the insurance contract (not in itself unlawful under Texas law), and that the money subsequently given to the city official was a campaign contribution, not a bribe. Garrett also relies upon his initial protestations, in the conversations that unknown to him were being taped, that he did not wish to participate in any illegal activity.

The government's essentially uncontradicted evidence shows the following:

In August, 1979, Hauser contacted a Texas acquaintance, who put him in contact with Harold Grubbs, a labor official in Houston; on the recommendation that Grubbs would split commissions on insurance deals "fifty-fifty." In a tape-recorded meeting,[3] Grubbs told Hauser about a union official, the defendant L. G. Moore, whom Grubbs described as "someone who would deal" and was "on the take." (On appeal, Moore objects to the use of this tape, GX 7, as highly prejudicial.)

Grubbs introduced Hauser to Moore to discuss the possibility of Moore's obtaining insurance business for Fidelity. Moore discussed his union connections in many states and indicated that insurance coverage for Texas school and hospital districts may be available. Moore, Hauser, and F.B.I. agent Mike Wacks met on September 10, where Moore accepted $2000 from Hauser and the three discussed potential business and potential commissions (a sum of $600,000 was mentioned) that Moore

3. All of the subsequent meetings of the agents with the defendants were tape-recorded; the government also taped telephone conversations of the defendants, in accordance with federal procedures.

could make. Moore named the defendant Garrett, the President of Richmond Road Engineering and a commissioner of the Port of Houston, as a "deal-maker" who could help them make additional connections for insurance contracts.

Moore introduced Garrett to Hauser and agents Wacks and Montague in October, asking for some "inside wires on the insurance business with Prudential." Garrett called Houston City Councilman Jim Westmoreland at that time to ask him about obtaining for Fidelity and Prudential the city employees' insurance coverage that was going to become open for bidding. This insurance contract becomes the focus of subsequent meetings and dealings, although other future and simultaneous deals were discussed and, for the most part, kept from the jury.

Garrett arranged to meet with Councilman Westmoreland after the November City Council election. At a November 28, 1979 meeting of Garrett, Moore, Wacks, and Montague, Garrett turned down an offer of cash but stated that he wanted a fifty percent split of the agents' commissions, which he would then split with Moore. He again called Westmoreland to discuss the Houston employees' insurance contract, telling the others that he "did not mind spending a few dollars if it looks like . . . we have to motivate the works for us."

At the time of these discussions, the Houston City Council was negotiating and soliciting bids in preparation for the January, 1980 expiration of insurance coverage of 25,000 city employees. Without consulting the government agents posing as Prudential/Fidelity agents, Prudential Insurance Company had itself prepared a bid, as did at least four other major companies. The Texas

Municipal League ("the League"), a commission representing over two hundred cities in Texas that sought to combine the bargaining power of the cities in order to obtain favorable insurance coverage for the municipalities, independently reviewed the insurance available and, coincidentally, adopted Prudential's plan. The contract finally signed by the City Council on December 26, 1979 was with the League, which contracted with a Texas insurance company that in turn contracted with Prudential to provide the coverage. (It is clear that the League had nothing to do with the efforts to bribe Westmoreland, and that it had independently selected what it considered the best coverage at the lowest price.)

Garrett and Moore's primary efforts in late November and December were to arrange matters so that Prudential would be selected for the new city insurance business that would produce a commission (according to the bogus agents) of around one million dollars. The defendants talked often to government agents Montague and Wacks. (Hauser had disappeared entirely from the scheme because he began serving his prison sentence; Moore knew the fact of Hauser's imprisonment, but explained his absence to Garrett by telling Garrett that Hauser was sick.) Moore telephoned the government agents, who had returned to California, in order to discuss progress of the insurance selection by the Council.

On December 11, Moore, Garrett, Wacks and Montague again met at Garrett's office in Houston to discuss payment of commissions and an upcoming meeting with City Councilman Westmoreland. The agents asked how much to give Westmoreland, and at Garrett's suggestion, they agreed to pay Westmoreland no more than $2000 at the first meeting.

That evening, the four waited at a hotel bar for Westmoreland, accompanied by Vincent Marinello, a lawyer from New Orleans who had independently called Westmoreland and who had worked with Hauser on a similar scheme in Louisiana. (*See* note 2 *supra*). Garrett told Montague to forget about paying Westmoreland anything that evening; in response to Montague's question, Garrett replied that, however, Westmoreland understood that he would be paid once the deal was signed. Westmoreland arrived and informed the group that Prudential would get the contract if it were, out of the five companies contending for the contract, the third best bid or better.

Garrett assured Wacks on December 13 that the contract would be approved at the City Council meeting the following week; however, the council postponed its vote on the issue for another week. The City Council voted in favor of the Texas Municipal League/Prudential coverage on December 26; Westmoreland seconded the motion for adoption of the contract and voted for it, while two councilmen voted against it. The next day, December 27, Moore called agent Wacks at the Fidelity offices in Beverly Hills, California. (This is the interstate telephone call upon which the present federal Travel Act indictment is based.) Moore told Wacks that the contract was to be voted on *that* day (although Moore had been present at the council meeting the day *before*, at which the Council voted in favor of the Prudential contract), and that they needed an extra $10,000 to commit a couple more councilmen. Wacks agreed to pay this sum. In the conversation. Moore stated that Garrett was in the room during the call.

Moore called again the same day, left a message, and Wacks returned the call. Moore then told him that the

contract had just been awarded at a premium of $12 million (of which the agreed commission for the agents and the defendants was ten percent).

Moore again called Wacks in California on December 28, asking for $10,000 so that Garrett could pay off Westmoreland. On January 5, 1980, Wacks told Moore that he wanted to be present when the $10,000 was given to Councilman Westmoreland, because the company wanted to ensure that the money was paid. On January 7, Wacks, Montague, Moore and Garrett met at a hotel in Houston where Moore and Garrett were given $6000 as their share of the commissions for the first month.

At this meeting, Garrett told Wacks that he had contacted Westmoreland about the meeting for the payoff, but that Westmoreland was too nervous to accept payment in the agents' presence. They arranged that Garrett would relay a code to Westmoreland's office in the agents' presence to signify that the payoff money was ready for delivery.

On January 11, Garrett, Moore, Wacks, and Montague met in Garrett's office; Wacks gave Garrett $5000 and Garrett left a message with Westmoreland's secretary in code that the "5/8 inch reinforcing steel was in." On January 21, Montague called Moore; Moore said that Garrett called the councilman and said that Westmoreland had "the steel." Garrett, Montague and a third party met on January 22 to discuss future business; Garrett said that Westmoreland was "happy," but wanted to know when the other payment of $5000 would come.

The Issues Raised by the Appeals

The following issues are raised by the defendants' appeals:

I. *Travel Act Jurisdiction:* (A) The indictment under the Travel Act, 18 U.S.C. § 1892(a)(3) (quoted in footnote 1) should have been dismissed, or an acquittal ordered, because a violation of this statute, and consequently federal jurisdiction, may not be based on a telephone call with so little interstate nexus with the unlawful activity and which did not "facilitate" the unlawful purpose within the meaning of the Travel Act; (B) Further, the happenstance that the telephone call *to* a government agent finds him located at a site in another state does not furnish a basis for jurisdiction or conviction under the Act.

II. *Entrapment issues:* (A) Availability of the defense; (B) Moore complains of the introduction of a redacted tape from which was excised overwhelming inducements offered to Moore by government witnesses; (C) Moore complains of the exclusion by the trial court of some "lack-of-predisposition" witnesses offered by him; (D) Moore contends that his "lack-of-predisposition" defense was severely prejudiced by the admission into evidence of two tapes of conversations between Hauser and Grubbs (the latter not called to testify), which moreover violated his Sixth Amendment rights since he was unable to cross-examine Grubbs as to his characterization of Moore as a labor leader who would "deal"; (E) Garrett contends that the evidence shows that he was entrapped as a matter of law and that the district court erred in not granting his motion for a directed verdict of acquittal.

III. *Outrageous government conduct:* Both defendants contend that the conduct and degree of involvement of the government agents is so outrageous as to violate their due process rights and entitle them to dismissal of the indictment.

I. *Travel Act Jurisdiction*

Garrett and Moore contend that federal jurisdiction under the Travel Act may not be predicated solely upon the out-of-state phone call made by Moore to the government agent in California and, further, that the telephone call to the government agent in the present case did not implicate "intent" to "facilitate" the defendants' "unlawful activities" within the meaning of the Act. The defendants thus argue that the indictment in this case should have been dismissed or acquittal ordered because federal jurisdiction was artificially created by the agents' use of the California office location. They also argue that the use of interstate communications was at best marginally involved in facilitation of an essentially local crime, and that the bribery activity preferably should be attacked under state law and not the Travel Act, which is intended primarily to be a weapon against organized crime.

(A) *Interstate Nexus and "Facilitation" Requirements*

The call of December 27, 1979, on which the government based Travel Act jurisdiction for the count on which the defendants were convicted, occurred under the following circumstances, as revealed by the taped conversations introduced into evidence at trial: Garrett requested that Moore call the agents to obtain details concerning the amount of the insurance premium. The same day, from Texas, Moore called agent Wacks at the Fidelity office in Beverly Hills, California, stating that the vote on the insurance contract had been postponed by the City Council and that $10,000 was needed to "move" a couple of the councilmen. Moore told Wacks that Garrett was in the room and needed a commitment from Wacks.

The defendants contend that the interstate call did not "facilitate" an "unlawful activity" within the meaning of the Act. They argue that the primary purpose of the Act was to combat highly organized criminal syndicates whose criminal conduct was beyond the reach of local officials, and that here the underlying state crime of bribery—technically implicating solely an intrastate insurance contract between the Texas Municipal League and the City of Houston—only marginally involved interstate commerce. Furthermore, they assert, the telephone call was merely incidental to commission of the offense, for all of the elements constituting the state crime of bribery were present and the crime was "complete" before the telephone call, when the defendants had agreed to pay Westmoreland for his vote. They also argue that the interstate nature of the calls, caused exclusively by the happenstance of the federal agent's location, contributed nothing to the scheme that could not have been accomplished by an intrastate call.

In urging a narrow construction of the Travel Act that would not encompass this "essentially local" bribery scheme, the defendants emphasize that "[l]egislative history of the Act is limited, but does reveal that [it] was aimed primarily at organized crime and more speifically, at persons who reside in one state while operating or managing illegal activities located in another." Rewis v. United States, 401 U.S. 808, 811, 91 S.Ct. 1056, 1959 (1971). In *Rewis*, the Supreme Court held that the Travel Act did not reach so far as to include the proprietors of a local gambling operation just because its customers had traveled interstate. The Court expressed concern that "an expansive Travel Act would alter sensitive federal-state relationships, could over extend limited federal police resources, and might well produce situa-

tions in which . . . geographic origin . . . , a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. at 812, 91 S.Ct. at 1059.

Subsequently, however, this circuit, later affirmed by the Supreme Court, observed that the Travel Act's expansive language did not outlaw only those "crimes 'typically associated with the underworld.'" Perrin v. United States, 580 F.2d 730, 733 (5th Cir. 1978), *affirmed*, 444 U.S. 37, 100 S.Ct. 311 (1979). In *Perrin*, the court found that the bribery of a corporate employee to steal data from his employer constituted an "unlawful activity" for purposes of the Act, and that a single interstate telephone call sufficiently facilitated the plan so as to sustain federal jurisdiction.

In affirming the determination of this court the Supreme Court held that the statute encompassed illegal activities besides those traditionally associated with organized crime, explaining that its concern in *Rewis* was not with the local nature of the predicate intrastate gambling operation, but with the "tenuous interstate commerce element." *Perrin*, 444 U.S. at 50, 100 S.Ct. at 318.

The Court concluded that, with regard to an underlying unlawful state "bribery" activity, 18 U.S.C. § 1952 (b)(2), "so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement." 444 U.S. at 812, 91 S.Ct. at 1059. Thus, here, bribery of a city official—the unlawful activity underlying use of interstate communication facilities in violation of the Travel Act—is clearly within the ambit of the statute. *See also* United States v. Pecora, 693 F.2d 421 (5th Cir. 1982) (bribery of a state sheriff).

We thus must analyze the nature of "the interstate nexus", *Perrin*, 444 U.S. at 812, 91 S.Ct. at 1059, *i.e.*, the interstate telephone call the defendant Moore placed from Texas to federal agent Wacks in California, in order to consider the defendants' contention that the call does not sustain federal jurisdiction or prove a violation of the federal act, because it did not facilitate, or at most only incidentally facilitated, unlawful activity, and because it occurred subsequent to the completed state offense of bribery (even though the bribe money was actually paid after the telephone call).

The Travel Act punishes the use of interstate facilities to "facilitate" the carrying on of unlawful activities that are *"thereafter"* performed, 18 U.S.C. § 1952(a) (quoted at note 1 *supra*), pertinently including the unlawful activity of "bribery", 18 U.S.C. § 1952(b)(2). The Act "reaches anyone who travels interstate or uses an interstate facility to facilitate an unlawful activity and thereafter performs or attempts to perform an act in aid thereof." United States v. Jones, 642 F.2d 909, 913 (5th Cir. 1981).

In both *Perrin* and *Pecora, supra*, the courts upheld a Travel Act violation based on a single interstate telephone call. *Perrin* involved a conspiracy to bribe an employee of a geological corporation (who acted as a government informer), in which the coconspirators bribed the employed informer to steal seismic exploration charts from his employer and to help set up a corporation for exploiting the data. The informer was instructed by the subsequently convicted coconspirators to call an out-of-state geological service to order corresponding maps for the stolen data. We stated that we need not consider the defendants' argument that obtaining the maps did not

constitute an essential aspect of the already completed bribery agreement, for "[t]here is no requirement that the use of interstate facilities be essential to the scheme: it is enough that the interstate travel or the use of interstate facilities makes easier or facilitates the unlawful activity." 580 F.2d at 736. *Accord,* United States v. Jones, 642 F.2d 909, 913 (5th Cir. 1981).

In *Pecora,* Travel Act jurisdiction was founded upon an interstate telephone call from the defendant, made at the request of the sheriff (who was cooperating with the F.B.I.), to discuss details of the proposed bribery to secure the dismissal of state drug charges. We applied *Perrin* and rejected the defendants' contention that the call, even if it made the bribery scheme easier, was too "fortuitous and incidental" to invoke the Travel Act. We concluded that the call served to "benefit" the scheme and that "we discern in the Travel Act no exception for casual and incidental occurrences or for 'happenstance' ones." 693 F.2d at 424.

Aside from the aspect of the government agent's location outside the state when the interstate call was received by him (which will be discussed below), the telephone call in the present case requesting funds for bribery is no more incidental or fortuitous than the calls invoking the Travel Act in *Perrin* and *Pecora,* found to be sufficient to sustain jurisdiction. The defendants argue that the interstate nature of the call, a mere happenstance resulting from the location of the government agent, added no special assistance to the scheme, for the same objects could have been accomplished by an intrastate call. This argument was implicitly rejected in *Perrin* and *Pecora,* for in those cases the defendants' plans would have been served equally by an intrastate call.

The defendants argue that the call did not benefit whatsoever the unlawful activity, because under Texas law, the crime of bribery was complete when the defendants agreed to pay Westmoreland for his vote. Arranging actual payment of the bribe, however, undoubtedly made easier the commission of the scheme, just as in *Perrin*, where the defendants had already offered to bribe the employee, an offense under Louisiana law, but used the interstate call to effect exploitation of the stolen data in order to pay the agreed-upon bribe—a percentage of the profits from the scheme.

We also cannot accept the defendants' contention that the call to a government agent could not "facilitate" the crime. At least by implication, *Perrin* and *Pecora* require rejection of this argument. There, the defendants were held properly convicted under the Travel Act for attempting to bribe the sheriff and the corporation employee, both of whom were secretly cooperating with federal authorities.

In the present case, Moore's call to Wacks to obtain funds (which resulted in Wacks subsequently giving the defendant $10,000) actually benefited the defendants' plans to arrange payment for Westmoreland in accordance with their agreement to pay him for his vote; it thus facilitated the unlawful bribery activity within the meaning of the Act, following and as a consequence of which the bribe money was actually paid. Moore's call to Wacks in this case likewise serves to invoke Travel Act jurisdiction over his codefendant Garrett, who aided and abetted in the entire scheme, was aware that the agents were based in California, and was present during Moore's call. The evidence further shows that he directed Moore to call the agents for the $10,000; as in *Perrin*, where

the defendants instructed a participant to telephone out-of-state, "it is sufficient that the [defendant] *caused* the use of interstate facilities." 580 F.2d at 736 (emphasis added).

(B) *Artificial Creation of Travel Act Jurisdiction?*

The defendants strenuously contend that federal jurisdiction was contrived, because the interstate element depended on the federal agents' location in California to receive the interstate call from Moore. Garrett and Moore argue that the existence of a federal crime should not depend upon the government's arbitrary—and in their opinion, inconvenient—out-of-state locale for the fictitious insurance agency, and that it was not necessary or useful to the government's "sting" operation or to the bribery scheme that the agents be outside the state on the dates of the city council vote regarding the insurance plan. The defendants suggest that it was at best a matter of happenstance, "and perhaps, a matter of government design", that the agents were in California during this time. They urge that this court adopt the standard articulated by the Second Circuit on rehearing in United States v. Archer, 486 F.2d 670, 685-86 (2d Cir. 1973) (emphasis added): "when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents a ***stricter standard*** is applicable than when the interstate or foreign activities are those of the defendants themselves."[4]

4. Because of the nature of governmental involvement, the Second Circuit in *Archer* rejected the establishment of Travel Act jurisdiction on the basis of several interstate and foreign phone calls. The court discarded as artificially created one call, where the government agent travelled into New Jersey solely in order to make a call to the defendants in New York (which the defendants then returned). 486 F.2d at 681. It also rejected the defendants' calls to Las Vegas that

In both *Perrin* and *Pecora*, discussed above, the defendants raised similar arguments concerning whether governmental agents improperly supplied the interstate nexus in the Travel Act prosecution. In *Perrin*, the court set forth the *Archer* standard urged by the defendants, and noted that jurisdiction in *Perrin* had been established by one count of the indictment that specified an out-of-state call to a third party made by one of the coconspirators. The court also considered, however, the Travel Act count in which jurisdiction depended upon the interstate phone call to a map store made by the government informer, determining that it could not "condemn the fact that the government informer was involved in the interstate element of the crime." 580 F.2d at 736. It found that the informer was a "follower" in the scheme and that another coconspirator selected the out-of-state source of the maps. This court warned, however, that although there was no artificial manufacture of jurisdiction present, a government informer could not "at the behest of the government . . . unilaterally supply the interstate element of a local bribery scheme and thereby transform [it] into a Travel Act violation: for example, [he] could not at the government's direction [go out of state] merely to call one of the coconspirators." *Id.*

In *Pecora*, the sheriff, acting for the government, had a message relayed to the defendant, while she was out-of-state, to call him to arrange the details of the planned bribery. The court found that there was no attempt to create or manufacture federal jurisdiction artificially under the Travel Act, for ample evidence existed to support

---

were in response to a government plant of misinformation that the agent could be reached there. *Id.* at 682. Finally, the court rejected as a "casual and incidental occurrence" the call that the government agent placed to the defendants while he was pursuing another government investigation in Paris. *Id.* at 682-83.

the trial court's determination that the sheriff requested the defendant to call before he learned that she was out-of-state. The court concluded that "[u]nlike *Archer*, the interstate element in this case was not furnished *solely* by undercover agents and there is no question of any attempt to contrive jurisdiction." 693 F.2d at 424 (emphasis added).[5]

Pecora and *Perrin* thus do not expressly adopt or reject the *Archer* "stricter standard" for testing the sufficiency of an interstate nexus involving government agents. In instances when the interstate nexus is furnished by a telephone call to a government agent, these decisions do, however, require the court to scrutinize the government's apparent reasons for its actions and forbid the government agent's movement out-of-state for the sole purpose of manufacturing Travel Act jurisdiction.

In the present case, no evidence shows that the agents initially set up Fidelity in California or arranged to be there when Moore and Garrett needed to telephone them for additional funds solely for the purpose of contriving an interstate nexus. The agents had established a base in California because of Hauser's connections there and, subsequently, decided to branch out-of-state from California into Louisiana and Texas because their activities in California were impaired by publicity that Hauser was a government informer. This preexisting out-of-state operation, combined with the fact that the defendant Moore was aware of the interstate nature of the agents' (fictitious) insurance business when he himself telephoned the

5. The *Pecora* court then rejected the *Archer* rationale for not permitting jurisdiction to be based on the government agent's call from Paris (*see* note 4 *supra*); contrary to the Second Circuit, this court concluded that the Travel Act did not except "casual, incidental, or happenstance" interstate contacts.

agents in California, is sufficient to show that the interstate element was not *solely* furnished by government agents and that the government did not attempt to contrive jurisdiction. *See also* United States v. Bagnariol, 665 F.2d 877, 896-99 (9th Cir. 1981) (the government agent's residence in a state other than that of the defendant was not established solely to manufacture an interstate element, but was a result of a prior undercover operation).

Because we find that interstate nexus here similarly was not artifically created to invoke federal jurisdiction, and does not infringe the standards of *Perrin* and *Pecora*, we conclude that Travel Act jurisdiction exists.

II. *Entrapment Issues*

In trial, and now on appeal, the defendants urged that they were innocent by reason of government entrapment. In our en banc opinion in United States v. Webster, 649 F.2d 346, 348-49 (5th Cir. 1981), we summarized the principles relating to the defense of entrapment:

> First recognized by the Supreme Court in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932), the defense of entrapment is "virtually unique to the criminal jurisprudence of the United States," G. Fletcher, *Rethinking Criminal Law*, § 7.3.B, at 541 (1978); *See* Mikell, *The Federal Courts*, 90 U.Pa.L.Rev. 245, 246 (1942). The justification for the defense is "that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government."[2] *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973). Three major Supreme Court cases, decided over a span of 41 years, establish that en-

trapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. U.S.*, 287 U.S. at 442, 53 S.Ct. at 212-213; *accord, United States v. Russell*, 411 U.S. at 428-29, 93 S.Ct. at 1641; *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958).

Notwithstanding the forceful arguments to the contrary, it is clear that when entrapment is at issue the focal point of the inquiry is on the predisposition of the defendant.[3] *See United States v. Russell*, 411 U.S. at 433, 93 S.Ct. at 1643. Thus, a defendant who wishes to assert an entrapment defense must initially come forward with evidence " 'that the Government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.' " *United States v. Dickens*, 524 F.2d 441, 444 (5th Cir. 1975) (quoting *United States v. Mosley*, 496 F.2d 1012, 1014 (5th Cir. 1974)). Once the defendant has carried this burden, the government must, if it is to prevail prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged. *United States v. Dickens*, 524 F.2d at 444.

During the government's case, the trial court ruled that there was sufficient evidence in the record to raise the entrapment defense. The trial court found that the evidence of government monetary inducements and the initiation of contacts for the insurance scheme satisfied the defendants' initial burden under United States v. Dickens, 524 F.2d 441, 443 (5th Cir. 1975), *cert. denied*, 425 U.S. 994, 96 S.Ct. 2208 (1976), to come forward with evidence showing that the government's conduct created a substantial risk that the offense would

be committed by a person other than one ready to commit it. Therefore, once the defendant raised the issue that the government had induced the defendants beyond merely affording opportunity or the facilities to commit a crime, the government was required to prove beyond a reasonable doubt "that the defendant was predisposed to commit the charged offense." *Dickens*, 524 F.2d at 444.

The trial judge permitted the defendants to present evidence and argue lack of predisposition, and instructed the jury that, if it found lack of predisposition on the part of Garrett or Moore, it must acquit such defendant of the charged offense.[6] By convicting the defendants, the jury rejected the entrapment defense.

On appeal, the issues raised relating to entrapment are:

A. As a threshold issue, the government contends that, even if error was committed in the respects contended by

---

6. The jury charge (to which the parties do not now object on appeal) reads in part:

> The defendants assert that they were the victims of entrapment as to the offenses charged in the indictment. Entrapment occurs when the criminal design originates with officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officials or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction. Law enforcement officials are not precluded from utilizing artifice, stealth and stratagem, such as the use of decoys and undercover agents, in order to apprehend persons engaged in criminal activities, provided that they merely afford opportunities or facilities for the commission of the offenses, by one predisposed or ready to commit it.

the defendants, it was harmless. The government argues that the entrapment defense was not available to the defendants under the facts presented, and therefore the district court improperly submitted the defense to the jury.

B. Moore complains of the introduction of a redacted tape from which was excised overwhelming inducements offered Moore by government witnesses.

C. Moore complains of the exclusion by the trial court of some "lack-of-predisposition" witnesses offered by him.

D. Moore contends that his "lack-of-predisposition" defense was severely prejudiced by the admission into evidence of two tapes of conversations between Hauser and Grubbs (the latter not called to testify), which moreover violated his Sixth Admendment rights since he was unable to cross-examine Grubbs as to his characterization of Moore as a labor leader who would "deal".

E. Garrett contends that the evidence shows that he was entrapped as a matter of law and that the district court erred in not granting his motion for a directed verdict of acquittal.

A. *Availability of the Defense*

The government contends that none of the defendants' contentions of error should be considered, because Garrett and Moore were incorrectly permitted by the district court to raise before the jury the defense of entrapment. The government contends that a criminal defendant cannot, as a matter of law, assert entrapment unless he admits committing the charged offense. Garrett and Moore reply that their defense that they lacked the intent to bribe Councilman Westmoreland is not inconsistent with the defense that, if their activity in approaching Westmoreland for help with the Prudential contract and subsequently mak-

ing a campaign contribution is indeed criminally culpable, they were nonetheless entrapped into doing so by the government agents' inducements.

In this circuit, the general rule is that the defendant may not deny the commission of the acts on which criminal liability is predicated and simultaneously claim that he was entrapped to perform those acts. "The rationale for the rule appears to be that to deny the very acts upon which the prosecution is predicated and at the same time to plead the defense of entrapment, which assumes that the acts charged were committed, is too inconsistent." United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977). The early decisions on this issue recognized that for practical reasons a defendant could not generally deny the substantive charge and raise entrapment, because in most cases, a defendant proving that he did not commit the criminal act could not consistently also prove that the government induced him to commit the act he denies occurred. Sears v. United States, 343 F.2d 139, 143 (5th Cir. 1965); Henderson v. United States, 237 F.2d 169, 173 (5th Cir. 1956). *See also* Hamilton v. United States, 221 F.2d 611, 614 (5th Cir. 1955) (defendant permitted to deny charge and assert entrapment; the court noted, however, that the defense of entrapment "assumes that the act charged was committed").

In both *Sears* and *Henderson*, however, this court recognized exceptions to the general situation and permitted dual defenses where, under the particular facts, "proof of entrapment [is not] contrary or repugnant to proof that the defendant is otherwise not guilty." *Henderson, supra*, 237 F.2d at 173. In *Henderson*, the defendant was permitted to admit to operating an illicit still, deny knowledge of (and thus participation in) a larger conspiracy, and "still defend on the ground that such overt acts as he

did commit were done as a result of entrapment." *Id.*[7] In *Sears*, the defendant, a sheriff, was charged with participation in a conspiracy to manufacture and sell illegal liquor by accepting a bribe; he was able to deny acceptance of the bribe and all knowledge of the conspiracy but receive a jury instruction on entrapment because the government's own case in chief injected substantial evidence of entrapment in the case. *Sears, supra*, 343 F.2d at 143.

Although in *Henderson* we stated that "it is generally held that inconsistent defenses may be interposed in a criminal case"—and thus declined to determine "[w]hether a greater degree of inconsistency in defenses [than presented in that case] should be permitted," *id.*, 237 F.2d at 173—subsequent decisions have recognized the requirement of consistency of defenses; *see*, "where a defendant does not have to take an inconsistent position, he is not precluded from invoking entrapment as a defense," United States v. Harrell, 436 F.2d 606, 612 (5th Cir. 1970). Nevertheless, this court has determined that generally "the defense of entrapment is unavailable unless the defendant admits the facts upon which the prosecution is based." United States v. Crossman, 663 F.2d 607, 610 (5th Cir. 1981). *See also* United States v. Webster, 649 F.2d 346, 351 n.10 (5th Cir. 1981) (en banc) (dicta); McCarty v. United States, 379 F.2d 285, 286-87 (5th Cir.), *cert. denied*, 389 U.S. 929, 88 S.Ct. 291 (1967); Beatty v. United States, 377 F.2d 181, 186 (5th Cir.), *reversed on other grounds*, 389 U.S. 45, 88 S.Ct. 234 (1967). One basis for this approach seems to be that

---

7. The court explained that it was proper for the defendant to argue: " 'I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped[,' for] the defenses do not seem to us so repugnant that proof of the one necessarily disproves the other." *Henderson, supra*, 237 F.2d at 173.

inconsistent defenses will tend to "confuse" the jury, *see Sears, supra,* 343 F.2d at 143, due to the "inherent inconsistency" in saying at the same time that "I didn't do it," and "the government tricked or seduced me into doing it." United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980).[8]

The rule that defendant must admit to the facts or acts constituting the charged offense is now firmly entrenched in this circuit. The most recent decisions of this court present some confusion, however, as to whether the defendant, while admitting to his involvement in the acts underlying the offense, may assert entrapment and argue that he does not possess the requisite *knowledge* or *intent* to render his conduct culpable. *See* United States v. Hill, 626 F.2d 1301, 1303 n.2 (5th Cir. 1980) (noting the "disarrary" of decisions in this circuit, but not addressing the "controversy" given the facts of that case). We find that the better approach, more in accord with the case law, is to determine whether the defendant's asserted defense is necessarily inconsistent with an allegation of entrapment.

In United States v. Greenfield, *supra,* 554 F.2d at 182, we discussed the *Sears* and *Henderson* decisions, concluding that the defendant, a doctor charged with illegally prescribing controlled drugs, should be permitted to deny commission of any crime and also raise the defense of

---

8. However, the now "fundamental rule that a defendant may not alternatively rely on inconsistent defenses of entrapment and denial of the commission of the crime has come under increasing attack," United States v. Hill, 626 F.2d 1301, 1303 n. 2 (5th Cir. 1980). *See also* United States v. Daniels, 572 F.2d 535, 542 (5th Cir. 1978) (criticizing the Fifth Circuit's position). The Ninth Circuit has rejected the inconsistency defense theory as "seriously infirm," since, as the *Henderson* court pointed out, criminal defendants are permitted to raise inconsistent defenses in other contexts. *See* United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975) (en banc).

entrapment. We found that the doctor's claim of legitimate medical purpose and lack of culpable knowledge or criminal intent—while admitting to the acts of prescribing the drugs—was not so "impermissibly inconsistent" as to preclude his argument that "to the extent that the jury may find culpability on his part, he was entrapped." 554 F.2d at 183. *See also* United States v. Smith, 407 F.2d 202, 204 (5th Cir. 1969), *cert. denied*, 397 U.S. 949, 90 S.Ct. 972 (1970) (defenses of lack of guilt and entrapment permitted as not inconsistent where the defendant contended that he was an agent rather than principal, but that whatever role he played was a result of entrapment).

In the present case, similar to *Greenfield*, Garrett and Moore deny wrongful intent to bribe Westmoreland; they instead argue that the payment, an undisputed act, was an innocent campaign contribution made *after* the city council voted to accept the Prudential Insurance plan as propounded by the Texas Municipal League. We agree with the trial judge that these alternative defenses, both founded on identical facts, are not impermissibly inconsistent.

Two cases after *Greenfield* do not compel us to adopt a contrary analysis. In United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980), citing *Greenfield*, we stated that in light of the defendant's defense of entrapment to sell firearms illegally, it is doubtful whether the court should consider his alternative defense that "he had no intention to violate the law because he did what was customary and what was, in his opinion, permissible." 611 F.2d at 618. Regardless of the court's doubt as to the efficacy of these alternative defenses, it emphasized that the contention of lack of culpable knowledge or intent was not raised until closing argument and that the evidence as to the element of culpable intent was

overwhelming. 611 F.2d at 617, 619. A panel of the Former Fifth Circuit, Unit B, cites solely to *Brooks* in rejecting the defendant's defense of entrapment to the charge of possession with intent to distribute cocaine, where the defendant contended during trial that he had no intent to distribute. United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982). It is arguable that the precedential value of *Nicoll* is minimal with respect to denying alternative defenses, however, because the court also notes that the defendant failed to assert the entrapment defense at trial, and thus cannot raise it for the first time on appeal.

We conclude that the defendants' defense of non-guilt —that they intended to offer money to the city councilman as a political contribution and not as a bribe to obtain favors—is not inconsistent with the defense that, whatever the legal characterization of the payment, they were entrapped into making it by the government agents. We therefore turn now to the defendants' contentions concerning the trial court's rulings with respect to the entrapment defense.

B. *Introduction of Redacted Tapes*

Moore contends that the trial court erred in refusing to permit him to play before the jury a portion of a government tape-recording of a meeting between him and government informant Hauser and F.B.I. agent Wacks in which the government agents offered to pay Moore $600,000 in commissions, to use their influence to place Moore's son in Georgetown Law School and to help Moore become president of International Union of Operating Engineers, in return for Moore's use of union, political and business influence to obtain insurance contracts for Prudential. Moore was able to cross-examine the

agents regarding all of these inducements, but he argues that it was necessary for the jury to hear directly the taped version for their consideration of his lack of predisposition. Moore suggests that the trial court's ruling was erroneously founded on a conclusion that evidence of these inordinate inducements was not admissible with respect to the jury issue of predisposition.

We disagree. The trial court stated that it disallowed the playing of the redacted portion because it also contained references to a proposed insurance deal in Austin that implicated other individuals and that was not the subject of the charged offense. Because Moore had the opportunity to elicit all of the desired information on cross-examination, he was not prejudiced by the trial court's determination to exclude the tape itself.

Moore also urges that because the government was permitted to play another part of the same tape, Fed. R. Evid. 106 requires that when one party introduces part of a writing or recording, an adverse party may require introduction of any other part of the recording that "ought in fairness to be considered contemporaneously with it." This "completeness doctrine," however, does not require introduction of portions of a statement that are neither relevant to nor explanatory of the admitted passages. United States v. Marin, 669 F.2d 73, 84-85 (2d Cir. 1982). Here, the redacted portion contained irrelevant matters (excluded at least in part due to possible prejudice to Moore by including wrongdoings that were not the subject of the trial), and Moore elicited the relevant information through cross-examination, such that "fairness" did not require playing of the entire tape.

C. *Exclusion of "Predisposition" Witnesses*

At the conclusion of the defendant Moore's testimony

at the close of this long trial, the district court denied Moore's counsel additional witnesses tendered on the issue of "predisposition." Moore contends that these rulings prejudicially hampered his defense on that issue.

The first contention is with regard to ten listed witnesses, public officials, who were to be called to give testimony that they had had dealings with Moore over a period of years in the political and labor fields and that they had never known him to do any improper, illegal or immoral act, or to attempt to commit any offense in the nature of bribery. By this time, during presentation of the defense case, at least eight witnesses had already testified that Moore, to their knowledge, had never taken a bribe and had an unblemished reputation. In denying the proffered testimony, the district judge, inter alia, characterized these tendered witnesses as "additional character witnesses" and ruled that he had already "allowed ample character witnesses for a case of this kind." We are unable to find an abuse of the district court's discretion under Fed. R. Evid. 404 to allow additional, cumulative testimony of this nature. *Accord,* United States v. Haynes, 554 F.2d 231, 234 (5th Cir. 1977).

Additionally, Moore also objects to the trial court's rejection of a proffer of the testimony of a lawyer, Ray, who was prepared to testify that Moore consulted him about the legality of accepting insurance commissions for his efforts regarding the City of Houston contract. Moore argues that this evidence would have shown his desire to abide by the law and thus would have proven lack of predisposition to commit the charged offense. Moore had already testified at trial, however, that he had consulted with an attorney who had told him that it was legal for him to receive the commission, so that the substance of

Ray's proposed testimony was before the jury. Moreover, the attorney's opinion concerned the propriety of receipt of the commissions *by* Moore, a person not licensed to sell insurance; while the subject at issue at the trial was the legality of the payments *to* Westmoreland, as to which the attorney's opinion was marginally, if at all, relevant. We conclude that the district court did not abuse its discretion by excluding Ray's testimony.

D. *Introduction of the Grubbs Tapes*

Moore contends that the introduction into evidence of two taped conversations between Harold Grubbs and government witness Joseph Hauser, is reversible error because the government tapes contain prejudicial hearsay concerning Moore's reputation. These tapes contain Grubbs' assertions that Moore, as a union official, would be a likely candidate to help Hauser obtain insurance business. At many points in the tapes, Grubbs describes Moore as someone who will "deal".

At trial, Moore argued that introduction of these statements about his character was prohibited by United States v. Webster, 624 F.2d 346 (5th Cir. 1981) (en banc), in which this court held that hearsay evidence of reputation is generally inadmissible for the government to show the defendant's predisposition and thus rebut an entrapment defense. Moore also urges that his Sixth Amendment confrontation rights were violated because Grubbs was unavailable for cross-examination with respect to the allegedly hearsay statements.

Before introduction of the tapes containing the objectionable statements, the trial court gave a cautionary instruction to the jury that Grubbs was unavailable to

testify and that his statements were not admissible to show Moore's bad character, but only to show why Hauser approached Moore. The court reiterated this warning during the final jury charge. The government argues, inter alia, that the tapes—constituting a half day of the jury's proceedings—were properly admitted for the limited purpose to show why the government agents acted as they did in meeting with Moore.

Grubbs' statements about the defendant Moore in the Grubbs-Hauser tapes were clearly inadmissible hearsay, both as to his predisposition, see *Webster, supra,* and as declarations by a coconspirator (since Moore had not even been approached yet to join the alleged conspiracy). We doubt that the statements were admissible over Moore's objection for the proffered purpose of showing why the government's witnesses approached Moore, because the relevant purpose for their admission—that the government agents had approached Moore on Grubbs' recommendation—could have proved by testimony to this effect without embellishment by the lengthy and many references to Moore in the prejudicial and uncross-examined statements of Grubbs that Moore was one who would "deal". Fed. R. Evid. 403.

We need not expressly rule on this issue, however, because if there was error, it was hermless. In the first place, the trial court expressly and repeatedly cautioned the jury against giving credence to Grubbs' statements. Additionally, over the government's hearsay objection, the district court permitted Moore to testify at length as to Grubbs' representations to him about the Prudential transaction and about Grubbs' dealings with Hauser, R. 41, p. 187 *et seq.*, which clearly developed Moore's defense that he thought he was doing nothing illegal when,

induced by the government agents, he went to work to earn commissions for himself from Prudential and political contributions for labor and its friends.

Weighing even more heavily in favor of the harmlessness of the error, Moore's "intent and predisposition to commit the acts charged was established largely by recorded evidence of his own statements." United States v. Howell, 664 F.2d 101, 105 (5th Cir. 1981) (holding under virtually identical circumstances and contentions that the error was harmless). The Grubbs-Hauser tapes were played on the ninth day of evidence taken during the twenty-seven days of trial. Evidence adduced after these tapes, primarily in the form of Moore's conversations with Garrett and the government agents, showed that Moore readily and immediately joined the insurance scheme and was active at every stage of the events. Considering the entire record, we are unable to find that the Grubbs' references to Moore in the tapes, which the jury was repeatedly cautioned by the district court not to credit for their truth, caused prejudice to any appreciable degree to Moore's entrapment defense.

E. *Entrapment as a Matter of Law*

Garrett contends that, regardless of the jury determination of guilt, he was entrapped as a matter of law. He argues that the government failed to offer proof that Garrett was predisposed to engage in a bribery-type offense and that his acts were a product of this predisposition rather than the activity of the government agents. In particular, Garrett argues that he initially refused to accept any payment from the agents, that he told the government agents that he did not wish to do anything illegal or fraudulent, and that the government agents

suggested that he make the contribution to Westmoreland. At trial, Garrett testified that he sought to use his political influence only, and that he told Westmoreland that the pay-off was a political contribution made after the City Council vote on the insurance contract.

"It is well-settled that the question of entrapment, if fairly raised, is one for the jury." United States v. Lentz, 624 F.2d 1280, 1286 (5th Cir. 1980). *See generally* United States v. Russell, 411 U.S. 423, 436, 93 S.Ct. 1637, 1645 (1973). In the present case, as we have stated, the defendants met their initial burden of production to present evidence that the government agents induced them to commit the charged offense. Having put forward the issue of entrapment, Garrett argues there was no evidence of predisposition and thus entrapment existed as a matter of law.

We disagree. Although it is unclear from the first of the taped meetings whether Garrett was offered any cash by Hauser, Wacks or Montague, he discussed a 10% commission split with Moore, and originated the idea of calling Councilman Westmoreland. Subsequently, he stated that he was not opposed to "spending a few dollars . . . to motivate the works for us" and discussed "deliveries" of funds to Westmoreland. These activities, along with Moore and Garrett's discussion of prior "cuts on deals," constituted evidence from which a jury could determine the existence of predisposition to engage in the transactions that resulted in the Travel Act offense. As stated in United States v. Dickens, *supra*, 524 F.2d at 445

> a jury may appropriately consider the defendant's conduct and statements subsequent to his initial contact with the government agent, as well as proof of his state of mind before the contact was made, to

> determine whether the accused should be classified as an "unwary innocent" or an "unwary criminal."

Because the government raised sufficient evidence to place the issue of predisposition before the jury, and there is no objection to the jury instruction, we do not "usurp the jury's proper role" to determine whether entrapment was present. United States v. Anderton, 679 F.2d 1199, 1202 (5th Cir. 1982). The evidence Garrett presented characterizing his activities as motivated by innocent intent is not "so overwhelming that it is 'patently clear' or 'obvious' that [he] was entrapped as a matter of law." *Lentz, supra,* 624 F.2d at 1287. As in *Lentz,* the jury could find with respect to the evidence that Garrett was a willing, knowing and voluntary participant in an illegal scheme, even though that scheme was conceived and in part implemented by law enforcement agents. *Id.*

III. *Outrageous Government Conduct*

Garrett, joined by Moore, argues that the conduct and degree of involvement of the government agents in this case is so outrageous as to violate due process guarantees of the Fifth Amendment. He asserts, as in the entrapment defense, that the crime allegedly committed would not have occurred but for the actions of the government agents. Additionally, Garrett urges that the government's actions created outrageous risks of harm: that the City of Houston purchased an insurance policy for its employees based at least in part on the efforts of the defendants and the government agents (risking their obtaining inferior coverage) and that Garrett's life was endangered because the government's activities entangled him with a Carlos Marcello, alleged to be an underworld leader, who allegedly had an interest in the Hauser insurance scheme.

In Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646 (1976), five justices of the Supreme Court[9] indicated that in some circumstances government involvement in the charged crime could be so excessive and outrageous as to bar prosecution of the private citizen. In United States v. Tobias, 662 F.2d 381, 386-87 (5th Cir. 1981), this circuit recognized the defense, indicating, however, that a due process violation will be found in only "the rarest and most outrageous circumstances." *Id.* at 387. Subsequently, in United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982), this court recognized, but rejected, the defense where the defendant sought to purchase cocaine from the government.

In *Tobias, supra,* the court held that there was no outrageous government conduct where the Drug Enforcement Administrator (DEA) established a chemical supply company to detect the manufacture of illicit drugs, and urged the defendant to manufacture amphetamines after he had cancelled his order for supplies to produce cocaine. The court determined that the case presented the "outer limits" to which the government could go in its attempts to ferret out and prosecute crimes, but found that under the totality of the circumstances, the defendant was a predisposed, active participant in a scheme to manufacture an illegal drug and was motivated exclusively by the desire to make money. 662 F.2d at 387. In *Nicoll,* the government's conduct was found not to be egregious

9. *See* 425 U.S. at 491, 494, 96 S.Ct. at 1650, 1652 (Powell, J., joined by Blackmun, J., concurring); 425 U.S. at 495, 96 S.Ct. at 1652 (Brennan, J., joined by Stewart and Marshall, J.J., dissenting). At least three other circuit courts have adopted this view. *See* United States v. Leja, 563 F.2d 244 (6th Cir. 1977), *cert. denied,* 434 U.S. 1074, 98 S.Ct. 1263 (1978); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

where the DEA merely initiated contact with the defendant, who then actively negotiated the cocaine deal. 664 F.2d at 1314.

Under *Tobias* and *Nicoll* and the prevalent jurisprudence, we cannot find that the government's conduct was so egregious and outrageous as to make the defendants' convictions subject to attack as a denial of due process.[10]

Conclusion

Because there was federal Travel Act jurisdiction in the present case, and the jury could properly determine that Garrett and Moore were not entrapped by virtue of government misconduct, we AFFIRM their convictions below.

AFFIRMED.

* * *

10. Although this conclusion seems required by precedent of this circuit, the author of this opinion, expressing views personal to him alone of the panel, insofar as he knows, feels obliged to note that, were he writing on a clean slate, he would feel that the defendants' due process rights were violated by their conviction of government-created crimes spawned from an enterprise of this magnitude formed solely for the purpose of inducing individuals to commit crimes through inordinately large financial inducements, whatever the predispositions of the individuals so ensnared.

Further, in the author's personal view, the federalizing of the state bribery offense—itself spawned and created by governmental inducements of this nature and magnitude—is an unjustifiable expansion of the Congressionally-intended reach of the Travel Act, especially where federal jurisdiction is founded upon a single interstate telephone call to a government agent (where the government had itself initiated the initial interstate contact with the Texas defendant). Again, however, I feel compelled by the precedents of this circuit to find Travel Act jurisdiction in the present case.

No. 82-2147, USA v. JOHN GARRETT and L. G. MOORE.

GARWOOD, Circuit Judge, Specially Concurring:

I concur in all of Judge Tate's excellent opinion for the Court except Part II.A. thereof ("Availability of the Defense"). I do not reach the difficult issues concerning the availability of the defense of entrapment dealt with in Part II.A. of the opinion because resolution of those issues is not necessary to and does not affect the disposition of this appeal.*

* Nor do I have occasion to take any position respecting the matters commented on in note 10.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-80-74

UNITED STATES OF AMERICA, Plaintiff

v.

L. G. MOORE, Defendant.

CRIMIINAL NO. H-81-74

UNITED STATES OF AMERICA, Plaintiff

v.

JOHN GARRETT, and L. G. MOORE, Defendants.

ORDER

Pending before the Court are various defense motions in the above styled and numbered causes.

I.

Both Moore and Garrett have filed motions to dismiss on the basis of manufactured federal jurisdiction, Defendant Moore has also moved to dismiss on the basis of police overinvolvement in the alleged conspiracy.

The leading Fifth Circuit case on Travel Act jurisdiction is *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978). In that case the defendants were convicted of violating the Travel Act when they used facilities in interstate commerce to promote the commission of a substantive crime (commercial bribery). The court held,

inter alia, that the use of interstate facilities need not be essential to the illegal scheme where the defendants caused the use in order to further an unlawful activity. *Perrin* concluded that when the federal element is furnished solely by undercover agents, a stricter standard would be applicable; but the court went on to say that it could not condemn the fact that a government informer was involved in the interstate element of the crime so long as the government informer did not unilaterally supply the interstate element.

In this case the Government will offer evidence that its investigation was national in scope and that the interstate element was supplied by the Defendants' activities.

The Court has reviewed the record and applicable authorities and is of the opinion that Defendants' motions to dismiss on the basis of manufactured jurisdiction should be, and are DENIED.

II.

Defendant Moore's claim of police overinvolvement is based on his contention that the investigation made the basis of this action was "active" rather than "passive;" and that the involvement of the government in the case was sufficiently egregious to warrant dismissal. Moore relies in part on language from Justice Powell's concurring opinion in *Hampton v. United States*, 425 U.S. 484 (1976). In that case Justice Powell intimated that a case might appear which would warrant dismissal on the basis of outrageous government conduct (police overinvolvement).

The Fifth Circuit recently declined to formulate a *per se* rule with respect to objective entrapment. *United States v. Gray*, 626 F.2d 494 (5th Cir. 1980). In that

case the court concluded that an informant's activity merely eased the way for the conspiracy when the informant suggested the scheme and aided in its furtherance by providing air transportation for a marijuana smuggling operation.

Defendant also relies on *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962). In *Williamson*, the government's payment of a contingent fee to an informer, conditioned on his "making" a given individual, was held to be entrapment as a matter of law. The case was restricted to its facts in *United States v. Onori*, 535 F.2d 938, 942-43 (5th Cir. 1976), where the court held that payment of an informer did not constitute entrapment as a matter of law when the informer was not directed to make a case against a specified individual. Following *Onori*, it is clear that Hauser's employment as a Government informer did not amount to entrapment as a matter of law.

After considering the evidence and arguments of counsel, L. G. Moore's motion to dismiss on the basis of police overinvolvement is DENIED.

[The remainder of the opinion is irrelevant to the issues before this Court. Both defendants later moved for directed verdict based on the same issues. This was denied without further opinion.]

* * *

Done at Houston, Texas, this 20th day of October, 1981.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2147

D. C. DOCKET NO. CR-H-81-74

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN GARRETT and L. G. MOORE,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

Before WISDOM, TATE and GARWOOD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 19, 1983

ISSUED AS MANDATE: Dec. 12, 1983.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2147

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN GARRETT and L. G. MOORE,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 19, 5th Cir., 1983, ____F.2d____)

(November 22, 1983)

Before WISDOM, TATE and GARWOOD,
Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

Signature Illegible
United States Circuit Judge